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IN THE

Supreme Court of the United States

Term. No. 176

GEORGE I. PEARCE,

Petitioner,

v.

PENNSYLVANIA RAILROAD CO., a corporation, and ESTHER HOFKIN, individually and trading as PENN GALVANIZING CO.,

Respondents.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Respondents.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

George I. Pearce, by his attorneys, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered in the above entitled case on May 16, 1947.

OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania is reported in 63 F. Supp. 817.

The opinion of the United States Circuit Court of Appeals for the Third Circuit is not reported.

JURISDICTION.

The judgment of the Circuit Court of Appeals for the Third Circuit was entered on May 16, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925; 28 U. S. C. A. Sec. 347 (a).

STATEMENT OF QUESTION INVOLVED.

Where a railroad employee, while loading a shipment, is hurt at a defectively maintained siding owned and controlled by the shipper and the railroad jointly, if the employee sues the railroad in a Federal Court under the Federal Employers' Liability Act, for failure to provide a safe place to work, is not employee's cause against the shipper so ancillary to the main action against the railroad as to permit joinder of the shipper as an additional defendant, even in absence of diversity of citizenship, especially where shipper had contracted to indemnify the railroad in the event of liability?

STATUTE AND FEDERAL RULES OF PROCEDURE INVOLVED.

1. Section 6 of the Federal Employers' Liability Act, 45 U. S. C. A. 56, which provides in part:

> "* * * the jurisdiction of the Courts of the United States under this chapter shall be concurrent with the Courts of the several States. * * *"

2. Federal Rule of Procedure 14, which deals with third-party defendants and provides in part:

> "* * * the plaintiff may amend his pleadings to assert against the third-party defendant any claim which plaintiff might have asserted against the third-party defendant, had he been joined originally as a defendant. * * *"

3. Federal Rule of Procedure 20 which deals with permissive joinder of parties and provides in part:

> "* * * all persons may be joined in one action as defendants if there is asserted against them jointly, severally or in the alternative any right to relief in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences, and if any question of law or fact common to all of them will arise in the action. * * *"

4. Federal Rule of Procedure 64, which deals with remedies and special proceedings and provides in part:

> "At the commencement of * * * an action, * * * all remedies * * * for the purpose of securing satisfaction of the judgment ultimately to be entered in the action

* * * are available. * * * The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action."

STATEMENT OF FACTS.

Plaintiff, an employee of the Pennsylvania Railroad Company, sued the latter in the District Court of the United States for the Eastern District of Pennsylvania, for injuries resulting, in the course of his employment, from dangerous and defective conditions on a siding at a plant owned by Esther Hofkin, individually, but trading as the Penn Galvanizing Company. Suit against the railroad is predicated on the Federal Employers' Liability Act for failure to provide a safe place to work. Jurisdiction of the Federal Court to that extent is conceded.

The railroad and Hofkin owned and controlled the siding jointly, and had entered into an agreement under which Hofkin agreed to indemnify the railroad in the event of liability. Therefore, because of this interrelation of responsibility for the siding, plaintiff joined as an additional defendant, the said Esther Hofkin, individually and trading as the Penn Galvanizing Company, on the theory that under the common law of Pennsylvania the additional defendant, too, had an obligation to provide a reasonably safe place for business invitees, including plaintiff, or at least to give warning of dangers extant. Joinder was bottomed on the principle of Federal Rules of Procedure 14 and 20. On motion of the additional defendant, the District Court (Bard, J.) dismissed the suit for alleged lack of jurisdiction, on

the ground that there is no diversity of citizenship between plaintiff and the additional defendant, both of whom are citizens of Pennsylvania.

In its opinion, the District Court noted (R. 10) that if the railroad had been the sole defendant, it could have brought a third party action against Hofkin based on the indemnity agreement between the railroad and Hofkin. The Court admitted that, in that event, Hofkin could not object to the fact that the plaintiff, the defendant and the third-party defendant were all citizens of the same state since the third-party action would be ancillary to the cause of action against the railroad.

However, while agreeing that Rule 14 creates jurisdiction as between the defendant and the additional defendant, the Court declined to permit *plaintiff* to file a complaint against a *third-party defendant*, Hofkin. From that ruling, plaintiff appealed on the ground that his right of action against Hofkin is no less ancillary to the main cause against the railroad than the latter's right of action for indemnity as against Hofkin, that plaintiff's joinder of the additional defendant Hofkin merely avoids circuity of action consistently with Rules 14 and 20, and that joinder of Hofkin is permissible under Rule 64.

SPECIFICATION OF ERROR TO BE URGED.

The Circuit Court of Appeals erred in the following respects:

1. In affirming the judgment of the District Court dismissing plaintiff's complaint against the additional defendant, Hofkin.

2. In holding that jurisdiction was lacking as to the claim against the additional defendant, Hofkin.

3. In refusing to hold that the proceedings against the additional defendant were merely ancillary to the suit against the principal defendant under the Federal Employers' Liability Act, and, therefore, did not require diversity of citizenship.

4. In failing to distinguish the scope of ancillary jurisdiction arising in connection with diversity of citizenship cases from the scope of ancillary jurisdiction arising under the Federal Employers' Liability Act.

REASONS FOR GRANTING OF WRIT.

1. The decision below of the Circuit Court of Appeals for the Third Circuit is inconsistent with the ruling of the Eighth Circuit in MO. PAC. RY. CO. v. METTE, 261 F. 755 (C. C. A. 8, 1919), which held that a plaintiff, suing in a Federal Court, not because of diversity of citizenship, but to enforce a Federal right under the Federal Employers' Liability Act, could join an additional defendant as an ancillary party, even in the absence of diversity.

2. The decision below of the United States Circuit Court of Appeals for the Third Circuit is inconsistent with the ruling of the Seventh Circuit in PEOPLE OF THE STATE OF ILLINOIS v. MD. CASUALTY CO., 132 F. 2d 850 (C. C. A. 7, 1942), the majority opinion of which implicitly but squarely held that, in a case originating in a Federal Court only because of diversity of citizenship, the Court had jur-

isdiction to adjudicate a claim as between plaintiff and an additional defendant, even in the absence of diversity.

3. The United States Supreme Court has not previously passed upon the interpretation and effect of Federal Rules of Procedure 14 and 20, despite numerous and conflicting lower court decisions as to whether plaintiff may claim against an additional defendant in the absence of diversity. The question is novel and important because of its constant recurrence.

4. The United States Supreme Court has not previously passed upon the interpretation and effect of Federal Rule of Procedure 64 with respect to whether that Rule permits joinder of an additional defendant as an ancillary party, in the absence of diversity.

5. The decision below deprives injured railroad employees of the advantages of a *Federal* forum, for the determination of all their rights, in a single action, in the many Federal Employers' Liability cases which involve concurrent negligence of a railroad and a third party tortfeasor, as to whom there is no diversity. In this respect, the decision below is contrary to the plain intent and spirit of Congress as expressed in the Federal Employers' Liability Act.

ARGUMENT.

Almost axiomatic is the rule that jurisdiction once attained is not lost by entry into a case of subsequent parties, even though lacking in requisite diversity of citizenship, if the subsequent proceeding is ancillary to the main cause. ALEXANDER v. HILLMAN, 296 U. S. 222, 56 S. Ct. 204

(1935); MOORE v. N. Y. COTTON EX., 296 F. 61, Aff'd. 270 U. S. 593, 46 S. Ct. 367 (1936).

The District Court (R. 10) conceded that:

> "Clearly, if the railroad was the sole defendant, it could have brought a third-party action against Hofkin based on the indemnity agreement between the railroad and Hofkin. Watkins v. Baltimore & O. R. Co., W. D. Pa., 29 F. Supp. 700. It then would not avail Hofkin that plaintiff, defendant and third-party defendant were all citizens of the same state since the third-party action would be ancillary to the cause of action between plaintiff and the railroad. The court's jurisdiction over the main action, based on the Federal Employers' Liability Act, would sustain the third-party action between the railroad and Hofkin notwithstanding the lack of diversity of citizenship between plaintiff and Hofkin or between the railroad and Hofkin. Sklar v. Hayes, E. D. Pa., 1 F. R. D. 415; Crum v. Appalachian Electric Power Co., S. D. W. Va., 27 F. Supp. 138; Bossard v. McGwinn, W. D. Pa., 27 F. Supp. 412; Tullgren v. Jasper, D. C. Md., 27 F. Supp. 413."

It is submitted that if, as conceded by the Court below, the joinder of additional defendant Hofkin to answer defendant, is merely ancillary to the original proceeding,[1] so, too,

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[1] See, to the same effect, cases cited in the District's Court's opinion and cases collected and discussed in 148 A.L.R. at 1186; on that page, it is stated that by the weight of authority, such joinder is deemed ancillary. See also WILLIAMS v. KEYES, 125 F. 2d 288 (1942 C.C.A. 5); GREENLEAF v. H. & B.T.M.R. & Coal Co., 3 F.R.D. 24 (1942); MALKIN v. ARUNDEL CORP., 36 F. Supp. 948 (D.C. Md., 1941); GRAY v. HARTFORD ACCIDENT & INDEMNITY CO., 31 F. Supp. 299 (W.D. La., 1940); MORRELL v. CENTRAL AIR LINES, 29 F. Supp. 757 (S.D. N.Y., 1939). Similarly, it has been held where a court has jurisdiction of an original suit, a cross complaint or counter claim will be treated as ancillary and will be adjudicated even though it could not have been entertained as an independent suit: GOLDSTONE v. PAYNE, 94 F. 2d 855 (C.C.A. N.Y., 1938) cert. den., 304 U.S. 585; 58 S.Ct. 1057 (1938); HARRIS v. TRAVELLER INC. CO., 40 F. Supp. 154 (E.D. Pa. 1941); SHANNON v. MASS. BONDING & INS. CO., 62 F. Supp. 532 (W.D. La., 1945), collecting many cases at Page 535.

joinder of the same additional defendant to answer the *original* complaint is likewise an ancillary proceeding. The two claims, of the plaintiff as of the defendant, against the third-party defendant are *pari materia*, involving the same facts and parties. For both defendants owned and controlled the siding jointly, the injuries resulted through their mutual neglect of same condition, and the railroad had procured, in advance, a promise of indemnity from Hofkin. As stated in 148 A. L. R. at 1184, regarding Rule 14:

> "There is probably no dissent in the cases from the proposition that the rule in question was adopted to avoid circuity and multiplicity of disputes arising from one and the same transaction; and all the cases dealing with the construction and application of this rule recognize or reiterate that that is the purpose of the rule."

Rule of Procedure 14, of course, is merely supplemental to the even more direct permission given to plaintiff by Rule 20 for joining additional defendants. If avoidance of "circuity and multiplicity of disputes" be the purpose of these Rules, it appears difficult to reconcile with that purpose, a construction of the Rules, by the Courts below, which concedes jurisdiction over the controversy between the two defendants, but at the same time denies jurisdiction as between plaintiff and the additional defendant.

How may adjudication, by a Federal Court, of the cause between two defendants, both residents of the same State, be sustained as ancillary to the main proceeding, if the plaintiff's cause against the additional defendant is not equally ancillary? Certainly, the defendant normally would not have been permitted to maintain a suit in Federal Court, as an original plaintiff against Hofkin, since both are resident in the same state and no Federal right is involved strictly as between them. The only prop supporting defendant railroad's cause against Hofkin in a Federal Court is the fact that plaintiff has instituted an action under the

Federal Employers' Liability Act against the railroad. Why, with equal propriety, should not the same prop support the plaintiff's cause against the third party? Only by arbitrary and indiscriminate resort to invocatory labels may the term "ancillary" be applied to the one cause, but withheld from the other. From any pragmatic viewpoint, the designation "ancillary" is properly appropriate in both causes or in neither.

Rule 20 permits plaintiff originally to join all persons liable either "jointly, severally or in the alternative." Rule 14 recognizes the same principle as between plaintiff and an additional defendant who has been joined at the insistence of the first defendant, and it provides, inter alia:

> "* * * defendant may move * * * to serve a summons and complaint upon a person not a party to the action who is or may be liable to him *or to the plaintiff* for all or part of the plaintiff's claim against him * * * *the third-party defendant may assert any defenses which the third-party plaintiff has to the plaintiff's claim.*" (Italics ours.)

The italicized portions of the rule clearly suggest that plaintiff's claims against the additional defendant may be adjudicated simultaneously with the cause between the defendant and the additional defendant and that of the plaintiff and the original defendant. In short, Rules 14 and 20 together purport to benefit both plaintiff and the original defendant. Neither as between defendant and additional defendant on the one hand, nor as between plaintiff and additional defendant, on the other, does there appear any requirement of diversity of citizenship. If, as the learned trial Court conceded, the cause between defendant and the additional defendant can be adjudicated even in the absence of diversity, the same Rule 14 can hardly be deemed to require diversity as between the plaintiff and the additional defendant. There is little warrant for an arbitrary distinction so

as to require diversity for one proceeding but not for another, both of which are created in the same breath.

It probably goes without saying that the term "ancillary" is merely descriptive of the result reached rather than a reason for the result. It may be postulated that a court may adjudicate a claim against a third party, even in the absence of diversity of citizenship, if the claim is "ancillary," though not otherwise. But there still remains the elusive question of whether a particular claim is "ancillary." The term possibly has made for confusion and has largely missed more basic and fundamental issues. Perhaps much more to the point would be the inquiry as to what the framers of the Constitution probably meant by "controversy," in their statement of judicial powers. Historical procedural inhibitions aside, it seems stilted to regard otherwise than as one controversy a situation like that in the instant case—with one single harm, occasioned by the same failure of both defendants to inspect the same property to find the same danger, and failure to warn the same plaintiff, along with contractual agreement for indemnity as between the two wrongdoers. Whatever segments might possibly be made of this situation, all are intrinsically part of the "same ball of wax," which, it is submitted, it is the obvious intent of the new Federal Rules to preserve together and intact, rather than to break artificially. If ever there be "oneness," within the meaning and purpose of the Rules, in a controversy involving two wrongdoers, a much stronger case could hardly be put. In any event, whether or not departure from the term "ancillary" be permitted and resort had to more basic considerations, it must be iterated that it appears anomalous to regard the claim between defendant and the additional defendant as "ancillary," but not the claim of plaintiff against the third-party defendant, when all three are citizens of the same state.

Nor is it persuasive to invoke Rule 82 as against the plaintiff while admitting its non-applicability as between defendant and the additional defendant. The proceedings

against the additional defendant are ancillary both with respect to the plaintiff and original defendant, or else Rule 82 precludes jurisdiction as to either's claim against additional defendant, if all the parties are residents of the same state. Of course, if the latter view be taken, Rule 14 loses all effect and meaning. In any event, it is not without significance that the Supreme Court itself has recognized and held that Rule 82 does not necessarily prevent other Federal Rules of Procedure from removing certain previously existing immunity from suit. MISS. PUBLISHING CORP. v. MURPHREE, 66 S. Ct. 242 (1946) (involving an alleged class between Rule 4f and Rule 82).

Even if an arbitrary distinction be made, as suggested below, between defendant's claim against the additional defendant, on the one hand, and plaintiff's claim against the additional defendant on the other, so as to ignore the fact of common residence in the former, but to stress it in the latter only, it should be noted that such an interpretation of Rule 14, on analysis, renders illusory, in large measure, even the defendant's conceded right to proceed against the additional defendant. For, in cases where defendant impleads an additional defendant on the theory that the latter alone is liable to plaintiff, unless plaintiff can recover against the additional defendant, nothing is gained by anyone, under the decision below, by impleading of the third party. That is, nothing could be gained which could not also be obtained without the latter's presence as a party. Defendant, of course, may avoid liability by proving negligence on the part of someone, other than himself, without resorting to third-party practice.[2] And, even where defendant seeks only contribution from the third party defendant, in many states, like New York (N. Y. C. P. A. Section 211a), which require judgments to be procured against both defendants before a right to contribution arises, neither plaintiff nor original defendant would get any advantage from

[2] SATINK v. TWP. OF HOLLAND v. LEHIGH VALLEY R. CO., 31 F. Supp. 229 (1940), discussed in 6 Fed. Rules Serv. 768.

Rule 14, if the views below prevail. See, criticizing on these grounds such a narrow interpretation of Rule 14, 6 Fed. Rules Serv. 768.

The District Court stressed the following language of Rule 14 (R. 11):

> "The plaintiff may amend his pleadings to assert against the third party defendant any claim *which the plaintiff might have asserted against the third party defendant had he been joined originally as a defendant.*" (Italics, lower Court's.)

This language was construed to mean that plaintiff cannot recover against the added defendant unless plaintiff might have sued that defendant alone to begin with. But such an interpretation of Rule 14 prevents it from giving any remedy or advantage which would not have existed without the rule, and renders the rule unnecessary and meaningless. It also ignores Rule of Procedure 20. That language of Rule 14, it is submitted, can more plausibly be interpreted to mean that, albeit the plaintiff might not have been able originally to sue the added defendant alone, now that the latter has been made party to an *ancillary* proceeding, plaintiff may proceed against him to the same extent as if plaintiff could have sued the additional defendant alone. This interpretation gives to the rule meaning and purpose which would otherwise be lacking.

In denying that plaintiff's action against the additional defendant is ancillary, the opinion of the Circuit Court emphasizes the differences between the theory of plaintiff's suit against the principal defendant, and the theory of plaintiff's claim against the additional defendant. Thus, it is pointed out that contributory negligence would merely mitigate damages in the claim against the railroad under the Federal Employers' Liability Act, whereas contributory negligence would be a complete bar to the plaintiff's claim against the additional defendant. But conceding such dif-

ferences, it must not be overlooked that the theory of the case as between the two defendants, themselves, would be equally, if not more divergent from the theory of the principal cause. The railroad's claim for indemnity would be based upon contract or quasi contract principles, while the main cause sounds in tort. Despite that difference in theory, it was not controverted below that the claim as between the two defendants is ancillary to the main cause. If so, is it not arbitrary to stress like or lesser differences in theory to justify denial that the claim as between plaintiff and the additional defendant is also ancillary?

Plaintiff's contention, that plaintiff's claim against the third-party defendant is "ancillary" to the main cause, is further supported by Rule 64 to which attention is respectfully directed. It will be noted that in view of the indemnity agreement between defendant and the additional defendant, if defendant is liable to plaintiff, defendant would of course have a right of action over against the third-party defendant. This right of indemnity would normally be subject to garnishment by the plaintiff under Pennsylvania law.[3] Under Rule 64,

> "*At the commencement* of * * * an action, * * * all remedies * * * for the purpose of securing satisfaction of the judgment *ultimately to be entered* in the action * * * are available. * * * The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, *however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.*"

It is submitted that under Rule 64, plaintiff is entitled "at the commencement" of the action against the railroad to join Hofkin for the purpose of satisfying a judgment

[3] MOSES v. FERREL and INDEMNITY CO. OF AMERICA, 97 Pa. Super 13 (1929); FERGUSON v. MFGR'S CASUALTY CO. OF PHILA. 129 Pa. Super. 276, 280 (1937).

"ultimately to be entered" against the original defendant. Since Hofkin is under a contractual duty to indemnify the railroad, joinder of Hofkin as an original defendant, in this case, achieves essentially no more or less than what is contemplated by Rule 64. See sustaining similar proceedings, even before the adoption of Rule 64, DEWEY v. WEST FAIRMOUNT GAS COAL CO., 123 U. S. 329 (1887).

It may be conceded that there is respectable case authority supporting the view below that, while rights as between two defendants may be adjudicated as being ancillary to the main cause despite lack of diversity, yet rights as between plaintiff and the additional defendant may not.[4] There is, however, likewise, substantial case authority supporting plaintiff's right to proceed against the additional defendant, even in the absence of diversity of citizenship. In PEOPLE OF THE STATE OF ILLINOIS v. MARYLAND CASUALTY CO., 132 F. 2d 850 (7th Circ., 1942), the majority of the Court assumed without discussion that there was jurisdiction to adjudicate a cause, on the merits, directly as between plaintiff and an additional defendant, even though there was no diversity of citizenship as between them, and even though Judge Minton write a separate opinion raising the jurisdictional question, and disagreeing with the majority thereon. Since jurisdiction is prerequisite to a consideration of the merits, the majority action in considering the merits, without any discussion as to jurisdiction suggests strong conviction on the part of the majority of the existence of jurisdiction as ancillary to the original cause. Many other lower court cases have also treated claims between plaintiff and the additional defendant as ancillary.[5]

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[4] See cases collected in 148 A.L.R. 1186 & 6 Fed. Rules Serv. 770.

[5] MYER v. LYFORD, 2 F.R.D. 507 (1942); CRIM v. LUMBERMAN'S MUTUAL CASUALTY COMPANY, 26 F. Supp. 715 (1939); CRUM v. APPALACHIAN ELEC. POWER CO., 29 F. Supp. 90 (1939); Semble, BOSSARD v. MC GWINN, 27 F. Supp. 412 (1939); GRAY v. HARTFORD ACCIDENT & INDEMNITY CORP., 36 F. Supp. 299, 304 (W.D. La. 1940); MALKEN v. ARUNDEL CORP., 36 F. Supp. 948, 950 (D.C.

JURISDICTION IS PREDICATED ON A FEDERAL QUESTION NOT ON DIVERSITY OF CITIZENSHIP.

Apart from the fact that there is, at worst, a division of authority as to the ancillary character of the plaintiff's claim against the additional defendant, it is noteworthy that those cases denying its ancillary nature originated in the Federal Court *only because of diversity of citizenship* between plaintiff and original defendant. Originating solely out of diversity, these cases, in requiring continuity of diversity as between plaintiff and additional defendant, may be understood if not justified. But, in the instant case, the *original jurisdiction was not predicated upon diversity of citizenship, and, therefore, diversity is not an issue. This action was founded upon a Federal right under the Federal Employers' Liability Act,* and, therefore, jurisdiction cannot be ousted by considerations of non-diversity of citizenship. Stressing the importance of distinguishing between cases based on diversity of citizenship and cases based on a Federal right, compare 6 Fed. Rules Serv. 770-771.

It is respectfully submitted, that if we are to recognize the obvious intention of Congress to provide the greatest possible number of *fori litigationis* in employer-liability cases for injured employees,[6] we must not permit any other

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Md. 1941); CHANNON v. MASS. BONDING & INS. CO., F. Supp. 532, (W.D. La. 1945) implying at page 536 that plaintiff may accept a judgment against a third-party despite lack of diversity. Cf. cases collected in 148 A.L.R. 1195; 1199 et seq. See, also, cases cited in footnote 2 of Judge Minton's separate opinion.

[6] Compare Chesapeake & Ohio Ry. Co. v. Vigor, 90 F. 2d 7 (C.C.A. Ohio, 1937), affirming 17 F. Supp. 602, cert. den. 302 U. S. 705, 58 S.Ct. 25 (1937); CONNELLY v. CENTRAL R. CO., 238 F. 932 (D.C. N.Y., 1916); BORIGHT v. CHIC. etc. RY., 180 Minn. 52, 230 N.W. 457 (1930); HOCH v. BYRAM, 180 Minn. 298, 230 N.W. 823 (1930). However restricted or limited the scope of jurisdiction in diversity cases may be, it is significant that in Federal Employers' Liability cases, the widest range of jurisdiction unsurpassed, if not unequalled, in any other type of case is accorded to the plaintiffs, who may sue where

jurisdictional questions to be interjected which will limit, rather than expand, the number of places where suit can be brought. That there is no diversity of citizenship between plaintiff and the additional defendant does not deprive plaintiff of his right to sue the latter in the Federal Court.[7] In MISSOURI PAC. RY. v. METTE, 261 F. 755 (C. C. A. Mo., 1919), an action was brought under the Federal Employers' Liability Act against a receiver for a railroad. It was held that a succeeding company, which, in purchasing the property of the railroad, assumed to pay claims against the receiver, *could be joined as an additional defendant, regardless of its citizenship.*[8] In the instant case, the additional defendant, under its contract with the railroad, assumed primary responsibility for claims against the railroad. The facts of this case, therefore, raise substantially the same problem as the Mette case and should be governed by the principle thereof.

Inasmuch as very frequently, indeed, employees of railroads engaged in interstate commerce are injured because of the concurrent negligence of the railroad and some third party, whether it be, as in this case, a customer into whose plant a siding runs or the owner of a truck that collides with a train at a crossing, we must recognize that most of Federal Employers' Liability accidents occur near the place where the employee was hired, where in all probability such third person and the employee have the same domi-

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they live, where the defendant lives or was incorporated, where the accident happened, or at any place where the defendant is doing business. Even the conservative tone of the present Congress failed to effect the passage of the Jennings Bill, H.R. 1639, which was designed to curb the broad jurisdictional scope of the Federal Employers' Liability Act.

[7] Jurisdiction over Federal Employers' Liability cases is not dependent upon diversity of citizenship: WABASH RY. CO. v. BRIDAL (C.C.A. Mo., 1938), 94 F. 2d 117, cert. den. 305 U.S. 602, 59 S.Ct. 63 (1939); CLARK v. SO. PAC. CO., 175 F. 122 (C.C.A. Tex., 1909).

[8] It is noteworthy that joinder of the additional defendant in MO. PAC. R.R. v. METTE was sustained prior to and without the assistance of Fed. Rules of Proc. 14 and 20.

cile. Accordingly, we should be requiring the plaintiff to bring two suits in separate courts to enforce his legal rights with consequent double costs, or we should be depriving the plaintiff of the right to use the Federal Court, an intention clearly not in accord with the thought expressed by Congress in the Federal Employers' Liability Act.

Nor should the depriving of the plaintiff of his right to sue both defendants jointly in a Federal Court be waved aside as inconsequential, merely because a joint suit might be possible in a state court. Access to a state forum is not the full equivalent of the right to Federal proceedings. Important differences exist in the procedure of the two forums. For example, plaintiff would not have available to him in a state court in Pennsylvania, the liberal, pre-trial discovery machinery which is at his disposal in Federal suits.[9] It goes without saying that, in actions such as this, where the facts concerning the operation and control of railroad equipment and property is peculiarly and almost exclusively within the knowledge of the defendant, the right to pre-trial discovery may well make the difference, to plaintiff, between recovery or no recovery. Moreover, it cannot be assumed without qualification that a state forum is always available to a plaintiff under the Federal Employers' Liability Act. Compare DOUGLAS v. N. Y., N. H. & H. R. CO., 279 U. S. 377, 49 S. Ct. 355 (1929).

Nor should plaintiff be jockeyed into maintaining two suits. Apart from extra costs entailed by an extra suit, and the waste of time and effort for courts and parties alike, plaintiff would be exposed to the risk of an adverse verdict in each case because of possible conflicting theories of the two defendants and two different juries that while plaintiff should recover, the sole liability should be that of the other defendant not sued in the particular action. In a single suit against the co-tort feasors jointly, a worthy plaintiff would prevail against at least one defendant. Otherwise the one

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[9] See Federal Rules of Procedure 26-37.

defendant in court, conceding plaintiff's right to recover, usually denies his own responsibility and shifts the buck to the "little man who isn't there"—the other defendant.

It is respectfully submitted that a Federal Act having given the Federal Courts the absolute and unqualified right to hear these cases, a further showing of diversity as to those who are concurrently liable, or under a duty to stand indemnity, is not requisite to the continued jurisdiction of the Federal Court over such cases. MO. PAC. R. CO. v. METTE, supra.

Inasmuch as jurisdiction in this case against the Pennsylvania Railroad Company is predicated upon the presence of a Federal question under a Federal statute (Federal Employers' Liability Act), the jurisdiction over the whole case, arising out of the facts which must necessarily apply to both defendants, is securely vested in this Court. All that has been said in all of the opinions which might be cited as an aid for the defendant, Penn Galvanizing Co., in seeking to avoid trial of this case in the Federal Court is based on that line of cases in which there was no Federal right serving to sustain jurisdiction, but rather diversity of citizenship, alone. As already indicated, the cases based on diversity are in wide disagreement as to whether a plaintiff's claim against an additional defendant is not ancillary. But even were the conflict resolved against permissible joinder, those cases would not control here where a Federal right is involved.

CONCLUSION.

It is respectfully submitted that the plaintiff's claim against the additional defendant is no less ancillary than a third-part complaint of the original defendant as against additional defendant, for purposes of diversity rules; and that in any event, predicated as this original action was, upon the liberal provisions of the Federal Employers' Liability

Act, doubts as to the ancillary character of the plaintiff's proceeding against the additional defendant should be resolved in favor of jurisdiction in order to accord to the plaintiff the full measure of benefit of Federal rights and proceedings established by Congress in his favor,

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1947 No. 176

GEORGE I. PEARCE,
Petitioner,

v.

PENNSYLVANIA RAILROAD CO., a corporation, and ESTHER HOFKIN, individually and trading as PENN GALVANIZING CO.,
Respondent.

Brief in Opposition to Petition for Certiorari to the United States Circuit Court of Appeals for the Third Circuit as of October Term, 1946, No. 9183.

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COUNTERSTATEMENT OF QUESTION INVOLVED

Does a District Court have jurisdiction of a civil action for common law negligence brought by a Pennsylvania plaintiff against a Pennsylvania defendant because the plaintiff has joined in the same suit as a co-defendant his employer, an interstate railroad, for a cause of action arising under the Federal Employers Liability Act?

(Answered in the negative by the Court below.)

COUNTERSTATEMENT OF FACTS

Petitioner, a citizen of Pennsylvania, is an employee of the Pennsylvania Railroad Company, a common carrier by rail engaged in interstate commerce. Respondent, a citizen of Pennsylvania, owns and operates a business in the City of Philadelphia served by a siding of the railroad. The petitioner brought a civil suit in the District Court for the Eastern District of Pennsylvania against respondent and the Pennsylvania Railroad Company for injuries caused by an asserted unsafe condition of a walkway beside the track located within the property of respondent. The complaint avers that the action arises under the Federal Employers Liability Act and the Safety Appliance Acts "and under the common law of Pennsylvania." The negligence averred in the complaint is the maintenance of the premises in a dangerous condition, and the complaint charges both respondent and the Pennsylvania Railroad Company with the creation of such condition and the failure to give petitioner warning thereof. Respondent filed a motion to dismiss the complaint as to her on the ground of want of jurisdiction. When the case was argued upon this motion, petitioner introduced into the record a written agreement of indemnity, under the terms of which respondent agreed to indemnify the railroad against liability for injury occurring on the premises as the result of respondent's negligence.

After hearing, the District Court dismissed the action as to respondent, without prejudice, for want of jurisdiction, which action was affirmed by the Circuit Court of Appeals.

The Pennsylvania Railroad Company appeared and answered the complaint on the merits. It has not at any stage sought to join respondent as a third party defendant.

ARGUMENT

Reduced to its simplest terms, this case involves the single question whether Rule 20 of the Federal Rules of Civil Procedure, relating to original joinder of parties, permits a plaintiff to join *at the outset of the proceedings* an admittedly non-federal cause of action against one defendant, with a federal cause of action against another defendant. The answer depends entirely upon the statutes referring to jurisdiction of the subject matter of the district courts and this Court's interpretation of those statutes; the mandate of Rule 82 prevents any interpretation of Rule 20 which would enlarge such jurisdiction: *Mississippi Pub. Corp. vs. Murphree*, 326 U. S. 438.

The action between petitioner and respondent is a local controversy between citizens of the same state, one of whom has been injured and seeks damages from the other. It is "business that intrinsically belongs to the state courts" of which the federal courts should be kept free in accordance with Congressional policy: *Indianapolis vs. Chase National Bank*, 314 U. S. 63, 76. Federal jurisdiction of such a local dispute cannot be created by joining the defendant with another as to whom diversity of citizenship exists: *Strawbridge et al. vs. Curtiss et al.*, 3 Cranch 267; *Indianapolis vs. Chase National Bank*, supra, p. 69. Nor can a plaintiff support jurisdiction of a non-federal cause of action by joining it with a cause of action arising under a federal statute: *Geneva Furniture Mfg. Co. vs. Karpen*, 238 U. S. 254; *Hurn vs. Oursler*, 289 U. S. 238. The principle that the device of joinder with a federal cause of action does not render a non-federal cause justiciable by a district court has been clearly established by this Court. There is no conflict in the decisions of the lower courts upon this question, nor any other reason suggesting that a review by this Court is required.

Petitioner's main argument is addressed to his contention that the action against respondent is ancillary to the action against the railroad, hence no independent juris-

dictional grounds are required to sustain it. The crux of his argument is that an "ancillary action" is an arbitrary term which has been devised to describe a "result", and that since the concept is unfettered by logic or reason, it may as well be used to describe and justify the result desired by petitioner. The term has not been so misused as petitioner asserts. An ancillary action has been defined on many occasions by this Court as one that is auxiliary or supplemental to the principal suit: *Minnesota Co. vs. St. Paul Co.*, 2 Wall. 609; *Carey vs. Houston & Texas Ry.*, 161 U. S. 115; *Dugas vs. American Surety Co.*, 300 U. S. 414. The function of the ancillary action may be to construe the decree in the principal action (*Minnesota Co. vs. St. Paul Co.*, supra); to attack the decree (*Carey vs. Houston & Texas Ry.*, supra); or to carry it into effect (*Dugas vs. American Surety Co.*, supra). In each such case independent grounds of federal jurisdiction are not required for the sound reason that the action is dependent upon a principal case in which jurisdiction has attached, and to require separate jurisdictional grounds in the ancillary action might render the principal court powerless to give full and proper effect to its judgment. It is clear that the ancillary action in the federal courts has been defined and limited to accomplish a definite purpose, and that an action which does not serve such a purpose will not be classed as ancillary.

Petitioner's description of his suit against respondent as ancillary to his suit against his employer does not meet this test. His action under the Employers Liability Act is complete and independent of his common law action against respondent. The holding of the court below that the actions are independent is not contrary to the decisions of any other circuit court of appeals. The case of *Missouri Pacific Ry. Co. vs. Mette*, 261 Fed. 755 (C. C. A. 8th), asserted to be in conflict, is entirely consistent with the decision below. In that case plaintiff, an employee of the receiver of Missouri Pacific Railway, sued the receiver

under the Federal Employers Liability Act. He joined as a co-defendant the Missouri Pacific Railroad Company, a corporate successor to which the receiver had transferred the assets of the carrier after plaintiff's cause of action had accrued. Jurisdiction as to the Railroad Company was sustained as ancillary on the ground that the Railroad was *secondarily* liable to satisfy any judgment obtained by the plaintiff, such liability being dependent upon first establishing the primary liability of the receiver. The decision approving joinder was clearly correct, since the suit against the Railroad was for the purpose of enforcing the judgment against the principal defendant. Petitioner can point to no case in which a suit charging two co-defendants with primary liability has been held ancillary as to either of them. Petitioner's complaint charges both defendants with primary liability. Respondent under no theory could be secondarily liable for any judgment against the railroad: the "indemnity agreement" between the parties merely holds the railroad harmless for *respondent's* negligent acts.

The construction of Rule 14 is in no way involved. The Pennsylvania Railroad Company has not moved to join respondent as a third-party defendant, and the question of petitioner's right, in the event of such joinder, to amend his complaint to state a cause of action against respondent as a third-party defendant, is not presented. If such question were presented, its solution would appear to be settled against petitioner's contention that he could amend to proceed against respondent. See cases cited in the Report of the Advisory Committee to this Court, 5 F. R. D. 434, 447, holding that a plaintiff cannot so amend unless grounds exist for an original suit against the third-party defendant. *People vs. Maryland Casualty Co.*, 132 F.(2d) 850 (C. C. A. 7th), cited by petitioner as inconsistent with the decision below, is in entire agreement with the cases cited by the Advisory Committee and with the decision of the court below. Third-party defendants after being add-

ed to the record attacked the original complaint and the third-party complaints by motions to dismiss for failure to state a cause of action, and the complaint and third-party complaints were dismissed on that ground. In affirming judgment of dismissal the majority of the circuit court of appeals thought that no jurisdictional question was involved (ibid. p. 853). In a concurring opinion one judge stated his opinion that permitting the third-party defendants to attack the complaint destroyed jurisdiction, there being lack of diversity between the plaintiff and the third-party defendants. The decision of the majority did not decide that there was jurisdiction to adjudicate a controversy between these parties, but affirmed the judgment of dismissal without discussion of jurisdiction. The case was properly disposed of without determination of any jurisdictional question, since the third-party defendants had attacked the third-party complaints as well as the original complaint. The dismissal of the third-party complaints necessarily carried with it dismissal of the original complaint, since the original defendant was the surety of the third-party defendants.

Petitioner argues that the settled rules of jurisdiction should not be applied to prevent the joinder of an alleged joint tort-feaser with a railroad employer. There is no basis for such a contention. The concurrent jurisdiction of the state courts is available for such joint suits; for 37 years Congress has prohibited removal of Employers Liability cases from state courts of competent jurisdiction (45 U. S. C. §56). The federal forum may be more desirable to some plaintiffs, but the state court is the more appropriate to entertain a suit for common law negligence. Certainly the policy of Congress is against further additions of local controversies to the heavily overburdened federal calendars: *Indianapolis vs. Chase National Bank*, supra, 314 U. S. at p. 76.

CONCLUSION

The decision of the court below is not inconsistent with the rulings in any other circuit. No novel questions of interpretation of the Rules of Civil Procedure are presented. It is respectfully submitted that the petition should be denied.

Respectfully submitted,

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